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Federal Communications Commission
445 12th Street Southwest
Washington, District of Columbia 20554

RE: RM-8763 Petition for Reconsideration of Order 01-372

Dear Sirs:

I am writing you today in regard to that certain Petition for Reconsideration of Order 01-372 submitted by Mr. W. Lee McVey. His petition has merit and I would ask that the FCC grant his request for review.

When Memorandum Opinion and Order PRB-1 was issued, the Commission took the position that there was a compelling federal interest in the promotion of the amateur radio service. Recognizing that dependable amateur communications depend in large part on the adequacy of the antenna system employed, the Commission correctly concluded that local zoning ordinances that are arbitrary, capricious, or do not otherwise accommodate reasonably the needs of the amateur radio service should be preempted by federal law. However, the Commission declined to specify a minimum height limitation below which a local government may not regulate, nor did PRB-1 dictate the precise language that must be contained in a local ordinance.

I believe that the Commission's implementation of PRB-1, while a well-intentioned and commendable attempt to limit the interference of a federal agency in the affairs of local government, is problematic for a number of reasons that I shall describe. Mr. McVey has set forth a number of compelling arguments in his petition, and I shall refrain from repeating them here.

I will start by reminding the Commission of the purposes of the amateur service which are codified at 47 CFR 97.1. These purposes are, *inter alia*,:

> (a) Recognition and enhancement of the value of the amateur service to the public as a voluntary noncommercial communication service, particularly with respect to providing emergency communications.
>
> And,
>
> (e) Continuation and extension of the amateur's unique ability to enhance international goodwill.

I would also remind the Commission that, as a matter of federal law, the only restrictions on station location are those enumerated at 47 CFR 97.13. The reasoning in 01-372 is in conflict with the established regulations because it concluded:

> "In this regard, we note that there are other methods amateur radio operators can use to transmit amateur service communications that do not require an antenna installation at their residence. These methods include, among other things, operation of the station at a location other than their residence, mobile operations, and use of a club station."

Whether the amateur can operate using other methods is not an issue; Title 47 does not require amateurs to do anything more than to comply with the established regulations. The argument set forth in 01-372 is, to put it plainly, non-sense.

Mobile communications are generally conducted in the UHF spectrum with relatively low power transmitters and, because of the propagation characteristics of the frequencies used, over very short distances. Other than occasional contacts with border areas of Canada and Mexico, mobile operations cannot contribute to "the amateur's unique ability to enhance international goodwill".

Similarly, one of the important functions of emergency communications is to transmit health and welfare messages over long distances when telephone communications have been interrupted. This requires transmitters that operate in the HF and VHF spectrum with adequate antenna structures. If amateurs are limited to UHF mobile and portable devices, they contribute little extra to emergency communications since police, fire, and other public services already use similar UHF band technology. However, the inadequacy of typical UHF radios in widespread disaster areas is the very reason Federal Emergency Management Agency and other governmental bodies work with the amateur community during disasters. The fact that RACES still exists, some fifty years after it was created as a "temporary" solution to meet the needs of the Civil Defense, is evidence of the on-going importance of the amateur community's contribution to emergency communications.

Many amateurs do not have access to a station at a location other than their residence nor do they belong to a club. My club does not have an HF station and, even if it did, it would be subject to the same zoning ordinances as my residence if it attempted to erect an antenna. At least one member of my club is visually impaired, and has no means to travel to a location other than his residence without assistance. As a public policy matter, the Commission should not impose additional requirements on the disabled unless absolutely required.

In any event, federal law permits an amateur to own and operate a radio, at whatever location the amateur chooses, on any frequency allocated to the amateur service, subject only to the operating privileges of their license, and the limitations set forth in Sections 97.11 and 97.13 of the Regulations. If the Commission intends to restrict operations at the residence of an amateur, it must amend 97.13 after adequate public notice and a hearing on the merits of such a change.

An amateur holding a class of license authorizing transmissions on the HF bands is entitled to the full use and enjoyment of those privileges; a concept not incorporated into the logic of 01-372. The US District Court for the Eastern District of New York ruled in **Andrew B. Bodney v. Incorporated Village of Sands Point, New York et al (681 F. Supp. 1009 E. D. NY 1987)** that:

> "The fact that Section 352.2 does not prohibit amateur communications is not the answer to a claim of preemption. An absolute limitation of height affects

> Bodony's right to the full use of his amateur extra class license and the license to use his property as an amateur radio station issued by the F.C.C."

I am unable to distinguish the argument articulated in 01-372 from the one rejected by the court in the above captioned case.

Congress delegates its powers to administrative agencies so that those with special expertise in certain matters may draft clear and consistent regulations that implement the intent of Congress. It is unavoidable that reasonable persons differ on the meaning of a particular regulation, and our court system exists to referee such disputes. However, judicial review is no substitute for clear regulation. While the FCC has been understandably reluctant to specify a particular antenna height, the Commission is uniquely qualified to do so given the engineering resources it has at its disposal to evaluate arguments which are more technical than legal in nature.

The matter of antenna restrictions, and the proper interpretation of PRB-1, has now been litigated in a variety of courts. Absent clear direction from the FCC, the courts have created a patchwork of rulings on what constitutes "reasonable accommodation" under PRB-1. A quick summary of some relevant rulings is enlightening:

- Order to permit erection of a 65-foot tower with an 8 foot mast for a total height of 73 feet (ruling of the District Court on remand from the Court of Appeals in **John Thernes vs. City of Lakeside Park, Kentucky et al (799 F. 2d 1187 (6th Cir. 1986)**).

- Order to grant a special use permit for a 47-foot mast (**Palmer v. City of Saratoga Springs, 180 F. Supp. 2d 379 (N.D. N.Y. 2001)**).

- Summary judgment voiding a 25-foot height ordinance (in Bodney, supra.)

- Reversal of summary judgment in favor of a city against issuing a permit for a 65-foot tower, with instructions on remand to comply with the terms of PRB-1 without the court specifying any particular height (in **Sylvia Pentel v. City of Mendota Heights, Minnesota (13 F. 3d 1261 8th Cir. 1994)**).

- Judgment ordering the city to reconsider an application for a variance to a 25-foot height requirement (in ***Howard v. Burlingame*, 726 F.Supp. 770 (N.D. Cal. 1991)**).

- Denial of a request to erect an antenna greater than 17 feet (***Williams v. City of Columbia*, 906 F.2d 994 (4th Cir. 1994)**).

- Denial of a request to erect an antenna with a height greater than 35 feet (in ***Evans v. Bd. of County Commissioners*, 994 F.2d 755 (10th Cir. 1993)**).

- Denial of a request to erect an antenna more than 5 feet above a roof (in ***People v. Krimko*, 548 N.Y.S.2d 615, 616 (Misc. 1989)**).

Thus, 73 feet was deemed a "reasonable accommodation" in the Sixth Circuit, 47 feet in the Second Circuit, 65 feet might be reasonable in the Eighth Circuit, 25 feet is probably not reasonable in the Ninth Circuit, 17 feet is reasonable in the Fourth Circuit, and 35 feet is reasonable in the Tenth Circuit. At least one state court managed to ignore the explicit language of PRB-1 requiring reasonable accommodation and ruled for the city. I also note that the circuits have reached different views on whether PRB-1 creates a private cause of action entitling the

plaintiff to recover costs under 42 USC 1983, thus some plaintiffs have been awarded their costs while others have not.

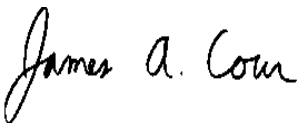
This result, albeit unintentional, is absurd. While I support the Commission's view that the federal government should not run roughshod over local government regulations that serve a legitimate purpose, such as safety considerations, if those governments are found to have implemented ordinances that are arbitrary and capricious, there should be a uniform result for the aggrieved party. Under the current scheme, it is up to the litigants to present briefs on a highly technical matter to judges who may not have the requisite background to understand the material presented. Those judges would welcome some guidance.

Absent clear regulation and direction from the Commission, this topic is certain to occupy even more time in the federal courts, and at considerable cost to the litigants. Given the heavy docket and number of judicial vacancies at present, the FCC would do the federal judiciary, local governments, and the amateur community a great service by mandating a set of standards for antenna structures based on the reasonable technical requirements of the amateur community. Those standards could still be modified or restricted by local ordinance upon a showing that such modification was necessary to meet a legitimate local government purpose. As one example, I call your attention to the zoning ordinance adopted by the City of Newport Beach, California. This ordinance carefully balances the aesthetic needs of this city, which is famous for its expensive residences and tough zoning standards, against the needs of its amateur operators.

Establishment of bright-line standards will reduce the temptation of the various circuits to create different results for different locales. I would argue that a federal regulatory agency with special expertise in this highly technical matter is in a better position to articulate the meaning of "reasonable" than the courts. The traditional venue to settle differences of opinion among the circuits is the United States Supreme Court and, while this matter may be ripe for their consideration, I suggest that there are more pressing matters for that court to consider than amateur antenna height.

Accordingly, I respectfully request the Commission to approve Mr. McVey's petition for reconsideration, to amend the offending language contained in Order 01-372, and to create antenna standards for use in the amateur service with the Newport Beach, California ordinance as a model.

Sincerely,



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